

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95481
)	
ANGELO JOHNSON,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE THOMAS J. PREBIL, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts the Jurisdictional Statement from his initial brief.

STATEMENT OF FACTS

Appellant adopts the Statement of Facts from his initial brief.

ARGUMENT

Counsel argued in Mr. Johnson's first point relied on that the trial court's failure to follow the procedures of section 558.021 resulted in plain error.¹ In reviewing claims for plain error, this Court looks to only two issues: first, whether "the trial court's error was 'evident, obvious, and clear'"; and second, whether "manifest injustice or miscarriage of justice has resulted." *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014), citing *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009).

As to the first issue, the State concedes that "the trial court did not comply with the timing procedures required by §558.021." (Rsp. Brf. 28). Therefore, the only contested question in the first point relied on is whether manifest injustice or miscarriage of justice has resulted.

In arguing that no manifest injustice resulted, the State asserts that there are only two purposes of section 558.021's requirement of establishing predatory sexual offender status before submitting the case to the jury: first, to determine whether the sentencing will be done by the judge or the jury; and second, "to prevent the jury from being presented with and having them consider in deliberation on issues of guilt highly prejudicial evidence of prior offenses." (Rsp. Brf. 29).

¹ Counsel also asserted that this point is arguably preserved for review since at the sentencing hearing, trial counsel mentioned the fact that the trial court had already made its ruling on whether or not Mr. Johnson qualified as a predatory sexual predator, and counsel further argued that Mr. Johnson did not qualify as a predatory sexual predator.

As to this first alleged purpose, the State is correct that Mr. Johnson waived his right to jury sentencing prior to trial. (TR 39-42). However, during the course of this appeal, Mr. Johnson has never claimed that a failure to be sentenced by the jury resulted in manifest injustice. The State's discussion of *State v. Sprofera*, 427 S.W.3d 828, 838-39 (Mo. App. W.D. 2014) is therefore a red herring. (Rsp. Brf. 29). *Sprofera* is completely inapposite to the question presented here because it involved only an erroneous finding that the defendant was a prior offender, which had no effect on either the maximum sentence or the minimum sentence he could be given. *Id.* at 839.²

As the second alleged purpose, counsel for Mr. Johnson fails to see how the timing requirements of section 558.021 would have any effect whatsoever on what the jury knows about a defendant's prior offenses. It is the judge and not the jury who makes a finding that a defendant is a prior offender, persistent offender, or predatory sexual offender; the jury is never informed of this finding. Clearly, waiting until the sentencing hearing to make a finding that a defendant is a persistent offender or a predatory sexual offender (in violation of section 558.021) could not possibly affect the jury's deliberation.

Even if the State was correct about the purpose of section 558.021, the purpose is irrelevant when this Court has already determined that section 558.021 imposes a mandate which must be followed. *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

² Furthermore, the defendant in *Sprofera* recognized that no manifest injustice resulted, and was only asking the Western District Court of Appeals to correct his classification as a prior offender due to possible collateral consequences of that finding. *Id.*

The State's argument also ignores this Court's determination in *Teer* that section 558.021 "implicates a defendant's liberty," and that the statute must therefore "be construed strictly against the state and in favor of the defendant." *Id.*, citing *Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999).³ In direct contradiction of *Teer*, the State is essentially asking this Court to construe the timing requirements of section 558.021 in favor of the State. However, due to the mandatory nature of section 558.021, this Court cannot simply disregard its plain language.

Notably, the State fails address Mr. Johnson's central point that manifest injustice resulted due to the fact that the statutory minimum for the offenses at issue increased from ten years in prison all the way to life in prison. Furthermore, the State makes no argument that *State v. Troya*, 407 S.W.3d 695 (Mo. App. W.D. 2013) was incorrectly decided. Instead, the State merely argues that it is distinguishable from the present case. (Rsp. Brf. 34). The State is correct that *Troya* and the present case are factually dissimilar; however, *Troya* is nonetheless relevant. This is because the Western District determined that plain error could result when a mandatory minimum sentence (but not a maximum sentence) was erroneously increased. *Id.* at 700-01. Just as manifest injustice occurred in *Troya* when the trial court mistakenly believed that persistent offender status increased the mandatory minimum sentence, manifest injustice occurred here where the

³ The Western District of this Court discussed these cited portions of *Teer* at length in *State v. Starnes*, 318 S.W.3d 208, 213-14 (Mo. App. W.D. 2010).

trial court failed to follow the mandatory procedures of section 558.021, leading to an increase in the mandatory minimum sentence from ten years in prison to life in prison.

Finally, the State argues that there was no manifest injustice because the trial court merely concluded prior to the jury's deliberation that the predatory sexual offender statute did not apply to Mr. Johnson. (Rsp. Brf. 31-32, n. 3, 35). However, this assertion ignores relevant comments made by the trial court. The trial court, for instance, stated the following:

I don't see how I can make this finding prior to a determination by the jury if one is made that he has committed these acts that he is alleged to have committed.

(TR 598-599). This statement clearly implies that the trial court was unwilling to make a determination of guilt before the jury did so. This is unsurprising since it would be virtually impossible for a judge to publicly make a finding that the defendant was guilty and then preside over closing arguments without calling into question the judge's impartiality. *See* Rule 2-1.2. Next, at the sentencing hearing, the trial court stated the following:

And I think that Section 558.018 Section 53 [sic] is applicable here. And it allows for a determination of a person as a predatory sexual offender if the Court finds that he has committed an act or acts against more than one victim which would constitute an offense as set forth in the statute.

The jury has found Mr. Johnson guilty of a large number of sexual offenses against three separate victims. And the Court does make

a determination of Mr. Johnson, Mr. Angelo Johnson, to be a predatory sexual offender . . .

(TR 677-678)(emphasis added). Notably, the trial court cited to the jury's finding of guilt when determining that Mr. Johnson was a predatory sexual offender. Once again, this implies that the trial court would have been unwilling to make this finding on its own before the jury deliberated.

The fact that the trial court was unwilling to make a finding that Mr. Johnson was a predatory sexual offender before the jury retired to deliberate, and instead made this finding at the sentencing hearing (in violation of section 558.021), puts this case squarely in line with *Starnes*, 318 S.W.3d at 211; *Teer*, 275 S.W.3d at 262; *State v. Wilson*, 343 S.W.3d 747 (Mo. App. E.D. 2011); and *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011). Mr. Johnson respectfully asks this Court to remand his case for resentencing without the possibility of sentencing him as a predatory sexual offender.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully asks this Court to remand his case for resentencing without the possibility of sentencing Mr. Johnson as a predatory sexual offender.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 1,447 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 25th day of April, 2016, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Karen Kramer, Assistant Attorney General, at Karen.Kramer@ago.mo.gov.

/s/ Samuel Buffaloe

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